

**U.S. v. Johnson, Case No. 04-50152**

**DEC 30 2005**

**Rawlinson, Circuit Judge, concurring in part and dissenting in part;**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

I respectfully dissent from those portions of the disposition holding that there is insufficient evidence to support the conviction on Count Three and that the prosecutor engaged in improper vouching.

In determining whether there is sufficient evidence to support a conviction, we view the evidence in the light most favorable to the prosecution's case. *United States v. Bailon-Santana*, 429 F.3d 1258, 1262 (9th Cir. 2005). The conviction must be sustained if any reasonable juror could have found the defendant guilty beyond a reasonable doubt. *Id.* As the majority opinion outlined, the pertinent statute punishes one who threatens to retaliate against any person for information "given by *a* person to a law enforcement officer." 18 U.S.C. § 1513(b)(2) (emphasis added). Whether the probation officer gave information directly to the law enforcement officers who arrested the defendant, or gave the information to her supervisor, a law enforcement officer, who relayed it to a judge who relayed it to law enforcement, the fact remains that the defendant threatened to retaliate against the victim for information given by *a* person to a law enforcement officer. Evidence satisfying this element of the statute was presented. Because information was given by *a* person to law enforcement, regardless of the identity of that person,

I disagree with the majority that a reasonable inference in this case is consistent with the defendant's innocence.

Similarly, I am not persuaded that *United States v. Combs*, 379 F.3d 564 (9th Cir. 2004), controls our analysis of the vouching issue. In *Combs*, the prosecutor argued that “in order to acquit [the defendant], the jury had to believe that [the DEA] agent risked losing his job by lying on the stand.” *Id.* at 574. Nothing of the sort occurred in this case. Rather, the prosecutor rhetorically asked the jury generally what motivation the government witnesses had to lie. There was no implication, as in *Combs*, that the prosecutor knew the agent “would be fired for committing perjury and that she believed no reasonable agent in [her] shoes would take such a risk.” *See id.* at 575. In the absence of such an implication, no improper vouching occurred. *Cf. United States v. Nash*, 115 F.3d 1431, 1439 (9th Cir. 1997) and *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir. 1985), with *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005).